No. 79-1429, 79-1583, 79-1789

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., MILLIKEN & COMPANY ARKWRIGHT MILLS, SPARTAN MILLS, BLAIR MILLS, INC., HERMITAGE, INC., DAN RIVER, INC., CONE MILLS CORPORATION, MAYFAIR MILLS, SPRINGS MILLS, INC., RIEGEL TEXTILE CORPORATION, FIELDCREST MILLS, INC., AND WEST POINT-PEPPERELL, INC., *Petitioners,*

v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES OF LABOR, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States is the largest business federation in the United States, consisting of over 98,000 corporations, partnerships, proprietorships and professionals, including 3,700 state and local chambers of commerce, and professional and trade associations.

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule No. 36.2.

The Chamber regularly represents its members' interests in litigation matters before the courts, as well as generally before the United States Congress, the Executive Branch, and Federal regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as an *amicus curiae* in a wide spectrum of cases before this Court.[2]

The position taken by the Occupational Safety and Health Administration (OSHA) in this case — that it may issue extremely costly health and safety standards with little regard for whether those standards bear any relationship to the benefits to the affected workers and the public at large — is of extreme concern to the Chamber. Almost all of the Chamber's 98,000 members come within the Occupational Safety and Health Act's (the Act) broad definition of "employers",[3] and the impact on those members is substantial. For example, a recent study of OSHA's policy for regulation of carcinogens estimated that it alone will result in $9 to 88 billion in capital costs and $6 to 36 billion in annual costs, depending on how it is applied.[4]

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[2] *See* e.g., *Whirlpool* v. *Marshall*, _____ U.S. _____, 63 L.Ed.2d 154 (1980); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, _____ U.S. _____, 65 L.Ed.2d 1010 (1980); *Chrysler Corp.* v. *Brown*, _____ U.S. _____, 60 L.Ed.2d 208 (1979); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).

[3] Section 3(5) of the Act, 29 U.S.C. 652(5), defines "employer" as ". . . a person engaged in a business affecting commerce who has employees. . . " *See*, *Marshall* v. *Anchorage Plastering*, 570 F.2d 351 (9th Cir. 1978).

[4] Booz, Allen & Hamilton, Inc., Preliminary Estimates of Direct Compliance Costs and Other Economic Effects of OSHA's Generic Carcinogen Proposal on Substance Producing and Using Industries (February, 1978). This study was directed to OSHA's proposal for a generic regulation on controlling occupational carcinogens. 42 Fed. Reg. 54148 (October 4, 1977). That regulation was issued on January 22, 1980. 45 Fed. Reg. 5002.

Moreover, the Chamber's members are concerned that OSHA's approach will ultimately lead to less effective protection for their employees. For without any consideration of whether the benefits derived from a standard bear any relationship to the costs it imposes, it is impossible for OSHA to insure that employees receive the most benefit for each dollar spent by their employers on safety and health.

OSHA has proceeded on the apparent assumption that the finances available for compliance with a particular standard are limited only by the demise of a substantial portion of the industry subject to the standard. *See AFL-CIO* v. *Marshall*, _____ F.2d _____, 7 OSHC 1775 at 1790-91 (D.C. Cir. 1979). Yet such an approach is myopic in its examination of individual standards in a vacuum, rather than an examination of costs and benefits of a particular standard in the context of the overall benefits to employers in providing safe and healthful workplaces to their employees. OSHA's approach appears to violate the purpose of the statute "to assure as far as possible" safe and healthful working conditions.

The Chamber believes that more lives can be saved and serious injury prevented by OSHA standards which offer a larger return for the resources expended. Yet unless OSHA examines the effectiveness of its standards (as required by this Court in *I.U.D., AFL-CIO* v. *A.P.I., supra*) in the context of their economic consequences, there is no assurance that these regulations will approach the maximum lifesaving potential of the resources expended.

As the director of the Council on Wage and Price Stability wrote to Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health: "Since OSHA is faced with a finite quantity of society's resources or maximum costs that can be allocated to

worker safety and health in any industry, OSHA should pay serious attention to the development of standards which will deliver the maximum increment of worker safety and health from every dollar spent on compliance." Scheibla, "The Benzene Case, Its Outcome Will Have a Major Impact on Federal Regulation," Barron's, p. 10 (January 29, 1979).

It is because of OSHA's obstinate refusal to recognize that it has an obligation to consider whether there is a reasonable relationship between the costs imposed by its standards and the benefits resulting from them — a consideration that benefits employers, employees, and the public-at-large (through the reduction of inflationary pressures) — that the Chamber submits this brief.[5]

SUMMARY OF ARGUMENT

A requirement that the Occupational Safety and Health Administration demonstrate a reasonable relationship between the benefits conferred by a standard and the costs imposed by it is consistent with the requirements of the Act that standards be "reasonably necessary" and "feasible". Contrary to OSHA's protests, such an approach will further employee safety and health by assuring that limited resources will be spent where they will do the most good.

Comparisons of cost and benefit commonly enter into all aspects of our lives, and are constantly used by government in determining how to spend its limited resources. Moreover, government agencies such as the Consumer Product Safety Commission and the National Highway Traffic Safety Administration with statutory mandates similar to OSHA's use cost-benefit analyses to

make regulatory decisions not unlike that made by OSHA here. If these agencies can successfully use this technique, we have difficulty in understanding why OSHA cannot.

The economic feasibility test employed by OSHA and the District of Columbia Circuit ignores the benefits conferred by a standard. Simply put, that test finds a standard economically feasible if it does not drive a substantial portion of an industry out of business. By concentrating solely on the costs of a standard, the test does not result in safety and health dollars being spent where they will do the most good.

Finally with regard to cost-benefit, we note that OSHA has ignored cost-benefit in determining the manner in which employers can comply with its standards. In this regard OSH has consistently contended that the most expensive means of compliance must be used even though less expensive means may be as effective in reducing exposures. OSHA's position has been rejected by the Occupational Safety and Health Review Commission and three Courts of Appeals.

ARGUMENT

I. Assessing Benefits In Light Of The Costs Imposed On An Industry Is Consistent With The Act's Purposes.

A requirement that OSHA demonstrate a reasonable relationship between the costs imposed by a standard and its benefits is perfectly consistent with the Occupational Safety and Health Act. In the first place, the statute is a pragmatic one, as demonstrated by Congress's choice of phraseology. Thus, Section 2(b)[6] states

[6] 29 U.S.C. 651(b).

that it is the purpose of the Act "to assure so far *as possible* . . . healthful working conditions" (emphasis added). And Section 3(8)[7] defines an "occupational safety and health standard" as one requiring an employer to take steps that are "reasonably necessary or appropriate to provide safe and healthful working conditions." Section 6(b)(5)[8] requires that in regulating toxic substances, OSHA should "set the standard which most adequately assures, to the extent *feasible*, on the basis of the best available evidence that no employee will suffer material impairment of health. . . ." (emphasis added) We submit that a requirement that there be a reasonable relationship between costs and benefits of OSHA standards is consistent with these precepts. *See generally, A.P.I.* v. *OSHA*, 581 F.2d 493 (5th Cir. 1978), *aff'd. sub nom, on other grounds, I.U.D., AFL-CIO* v. *A.P.I., supra.*

As one commentator has noted:

> Each of the emphasized terms ["most adequately", "feasible", and "material"] requires a balancing of costs and benefits.
>
> The term "most adequately" is, of course, a solecism: something is either adequate or inadequate to serve its intended purpose. Also, had Congress wished to require OSHA to implement standards that ensure, to the extent feasible that no employee will suffer material impairment of health, Congress could have omitted the term "most adequately" and achieved that result; or to emphasize such an intent, Congress could have omitted the word "adequately" and retained the word "most," requiring OSHA to promulgate a standard that "most assures, to the extent feasible, . . . that no employee will suffer material impairment . . ." Given these ready, grammatically sound and more succinct ways of requiring

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[7] 29 U.S.C. 652(8).

[8] 29 U.S.C. 655(b)(5).

> severe standards, Congress' use of the ungrammatical and tortured "most adequately" should be read as evidence of its intent to require OSHA to consider all societal costs of standards it proposes.

Wheeler, "Cost-Benefit Analysis on Trial: A Case of Delusion and Reality," National Law Journal, October 20, 1980, p. 29.

Many years before the Fifth Circuit's decision in the benzene case (*A.P.I.* v. *OSHA, supra*) suggested the possibility of a cost-benefit requirement inherent in the OSH Act, Professor Currie stated that Section 3(8) "does not simply require whatever is 'necessary' to achieve the requisite level of safety, it requires what is 'reasonably necessary or appropriate.' " "What is 'appropriate' may be what is desirable in light of feasibility or cost; what is 'reasonably necessary' may be what is both necessary and reasonable." Currie, "OSHA," American Bar Foundation Journal, 1976, pp. 1107, 1134.

OSHA has, however, steadfastly contended that "cost-benefit criteria" are inconsistent with the OSH Act. Brief for the Federal Parties, *I.U.D., A.F.L.-C.I.O.* v. *A.P.I.*, Nos. 78-911 and 78-1036, p. 40 *et. seq.* However, this misses the point. No one in this case has suggested that one must place a price tag on human life, and then decide whether an OSHA regulation is "worth it" in terms of that price tag. Instead, the point is that because the resources available for occupational safety and health are limited, they should be spent where they will have the maximum effectiveness in terms of lives saved. In order to approximate their lifesaving potential, OSHA must have some rough idea as to what the health benefit of each standard is compared to reasonable alternatives. Only in this manner can OSHA achieve its

statutory goal "to assure so far as possible every working man and woman in the nation safe and healthful working conditions." 29 U.S.C. §651. Standards unnecessarily requiring expenditures of millions of dollars will clearly not achieve anything close to the maximum lifesaving potential of the available resources.[9]

II. Considerations Of Cost And Benefit Enter Into All Aspects Of Our Lives

In this and other cases OSHA has implicitly argued that cost-benefit considerations are somehow immoral, and generally have no place in the safety and health arena. See *e.g.* Brief for the Federal Parties, *I.U.D., AFL-CIO* v. *A.P.I.*, *supra*, at pp. 62-63, n. 52. Yet, cost-benefit analyses are commonly performed in all aspects of our lives, even though both serious injury and perhaps death are possible consequences of the activity.

As one article has noted:

> The person who goes to work decides that the anticipated benefits of work outweigh the risk of injury that necessarily attends the trip to the place of employment; the person who plays golf decides that the anticipated pleasure of that exercise outweighs the risk of being hit by a ball or of pulling a muscle; the person who smokes, drinks, skis, swims or rides a motorcycle decides that those pleasures are worth the attendant risks. And such decisions are made where the safety of other persons is involved: the parents who leave their baby unattended in bed for one hour have decided that the pleasure of turning their attention elsewhere justifies the risk that their unattended infant will injure itself in the next room.

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[9] *See*, Hapgood, "Risk-Benefit Analysis, Putting a Price on Life," The Atlantic, January 1979, pp. 33-38.

> The examples are infinite in number, because some danger inheres in every human action and omission; and some amount of safety is sacrificed by every action and omission. The variables are the probability of harm and the possible type of harm.

Wheeler, "The Public's Costly Mistrust of Cost-Benefit Safety Analysis," National Law Journal, October 13, 1980, p. 27.

Similarly, our government repeatedly uses cost-benefit considerations:

> . . . the decision to have a 55 mph speed limit, rather than a 25 mph speed limit, is unequivocally a decision to permit thousands of deaths; the decision not to allocate government funds to produce many more kidney dialysis machines is the same kind of decision; and the decision to promulgate air-quality regulations that permit any accumulation of smog is the same kind of decision.

Wheeler *supra,* at p. 29. And Federal administrative agencies with mandates not dissimilar from OSHA's use cost-benefit analyses as an effective tool to determine when to regulate and how to regulate.

For example, the CPSC operates under a statutory mandate to protect the consumer from "unreasonable risks of injury" associated with consumer products. 15 U.S.C. §2051(b)(1). Each standard must be "reasonably necessary" to prevent or reduce such risk. 15 U.S.C. §2056(a). This compares to the OSH Act, which is aimed at "material" impairment of health and requires that standards be "feasible" and "reasonably necessary." 29 U.S.C. §§652(8), 655(b)(5).

The CPSC's recent standard for walk-behind power lawn mowers illustrates its use of risk estimation in com-

plying with its statutory mandate. In this standard, the CPSC estimates that about 150,000 injuries associated with power lawn mowers occur each year, about 60,000 of which are treated in emergency room. 44 Fed. Reg. at 9992 (Feb. 15, 1979). The CPSC further breaks down the number of injuries expected to be prevented by each of the major requirements of the standard; estimates the dollar savings exclusive of pain and suffering; estimates the total retail price increase resulting from the standard ($189 million); and concludes that the standard is reasonably necessary to reduce an unreasonable risk of injury. 44 Fed. Reg. at 9996-7 (Feb. 15, 1979).

Another example of effective agency use of cost-benefit analysis is that of the National Highway Traffic Safety Administration (NHTSA).

In its "Five Year Plan for Motor Vehicle Safety and Fuel Economy Rulemaking", NHTSA has stated that among the factors it considers in establishing motor vehicle safety standards are "anticipated costs to consumers and industry" and "lifesaving potential of a safety standard." 43 Fed. Reg. 11100, 11101 (March 16, 1978). An excellent example of NHTSA's practice in this regard is found in its air bag standard, which sets forth the "Fatalities Prevented Per Year" and the "Injuries Prevented Per Year" under each of the various occupant restraint systems under consideration, with costs estimates for the full front air bag system (one of the options chosen in the final regulation). 42 Fed. Reg. 34289, 34298-99 (July 5, 1977).[10]

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[10] A more detailed breakdown of NHTSA's cost-benefit analysis of the air bag standard is set forth at 41 Fed. Reg. 31860 (July 30, 1976). Using the highest NHTSA cost estimate, the full front air cushion system, adopted in the final regulation, is estimated to save lives at a cost under $300,000 per life (leaving out of the estimate any allocation of cost to the substantial number of injuries prevented by the regulation).

NHTSA's statutory mandate is similar to OSHA's. Like OSHA, NHTSA's overriding mission is to protect health and safety: to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. §1381. However, the standards must be "reasonable, practicable and appropriate." 15 U.S.C. §§1392(f), 1391(2). Mr. Justice Stevens' description of NHTSA's authority fits almost exactly to OSHA:

> Although I recognize that safety is the 'overriding consideration in the issuance of standards' under this Act, the statute requires respondent to consider whether a proposed standard is 'reasonable, practicable and appropriate' before it is prescribed.

H & H Tire Company v. *Department of Transportation*, 471 F.2d 350, 357 (7th Cir. 1972) (Stevens, J., concurring). But unlike OSHA, NHTSA interprets this mandate to estimate the safety and health benefits of its regulations.

Thus, cost-benefit analyses are not the radical approach to regulation that OSHA would have one believe. Rather, it is a rational, commonly applied method of determining whether regulation is "reasonably necessary" and "feasible."

III. The District Of Columbia Circuit's Holding That OSHA Standards Are Economically Feasible So Long As The Affected Industry Is Not Put Out Of Business Is Erroneous.

OSHA argued, and the District of Columbia Circuit held, that a standard was economically feasible so long as it did not make " 'financial viability generally impossible' for a regulated industry." *AFL-CIO* v. *Marshall*, 617 F.2d 636, 661.[11] The court also noted that

[11] *Quoting*, *Industrial Union Department* v. *Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974).

"[e]ven if a few firms are forced to shut down, the standard is not necessarily economically infeasible." *Id.*

The Chamber submits that such a test is far removed from the best interests of employees and is not required by the Act. Moreover, we believe that a cost-benefit test better serves the interests of safety and health.

Our basic objection to OSHA's (and the D.C. Circuit's) test is that it totally ignores the benefits conferred by the standard. Thus, a standard that produces relatively few benefits but is extraordinarily expensive could drive the affected industry to the brink of financial viability. Under the test adopted by the D.C. Circuit, this standard would be economically feasible.

Yet, if OSHA should subsequently issue another standard affecting the same industry, which may in fact produce greater benefits for more workers, that standard would be found economically infeasible because the additional costs would put the industry over the financial brink.

Such an approach benefits neither the employer nor the employee; and, we are hard pressed to understand how it furthers the purposes of the Act. Rather, an approach which preserves economic resources for the situation where they will do the most good is eminently more reasonable than that of OSHA.

IV. OSHA Has Unreasonably Refused To Consider Whether There Is A Reasonable Relationship Between The Costs Imposed By A Standard And The Benefits Conferred In Determining *How* To Regulate Toxic Substances.

Despite the statutory mandates previously discussed, that OSHA standards be "reasonably necessary", "feasible", and address "material" workplace hazards, OSHA has consistently chosen the most expensive means of eliminating exposure to toxic substances or harmful physical agents. Thus, OSHA has rejected substantially less expensive means of compliance in order to achieve increases in safety that are marginal, at best.[12]

Even where there is agreement that some regulation of a health problem is justified, OSHA has rejected any reliance on a cost-benefit test in determining how to regulate.

The Occupational Safety and Health Review Commission, the independent agency establishment by the Act to review OSHA enforcement actions (29 U.S.C. §661,) has disagreed. In *Continental Can Company*,[13] OSHA had cited Continental for violation of OSHA's noise standard in that Continental had not installed engineering controls in its plants to reduce noise levels. The parties had stipulated that Continental had provided its employees who worked in areas of excessive noise with personal protective equipment (ear muffs and ear plugs) which effectively reduced their exposures to noise below the levels provided by the standard. 4 OSHC at

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[12] Petitioners, here, pointed out in their petition that OSHA rejected "an equally effective, but considerably less expensive, alternative to the standard effective, but considerably less expensive, alternative to the standard OSHA promulgated." Petition for *cert.* p. 9.

[13] 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21, 009 (1976).

1542. Despite the fact that the personal protective equipment effectively protected the employees from the hazard at an annual cost of approximately $100,000, OSHA contended that Continental should spend $32 million to install engineering controls to achieve the same result. 4 OSHC at 1544. OSHA argued, as it has here, that the extreme cost difference between the two means of compliance could not be considered unless the cost of the controls "seriously jeopardized the financial condition of the company." 4 OSHC at 1542, n. 4. The Commission (Cleary dissenting) held that the comparative cost of alternative means of compliance was a valid consideration, and that, under the circumstances, OSHA had failed to establish that the $32 million engineering controls were "feasible."[14] The Commission noted that OSHA's approach was unreasonable "because it does not distinguish between hazards" 4 OSHC at 1547. It went on to say:

> The argument also ignores the benefits to be gained since it requires employers to expend funds for each and every health hazard whether life threatening or not without limit so long as the expenditures for each hazard can be borne without putting the employers' financial condition in jeopardy. Clearly, employers have finite resources available for use to abate health hazards. And just as clearly if they are to be made to spend without limit for abatement of this hazard their financial ability to abate other hazards including life threatening hazards, is reduced. We can conceive that in some if not many cases it will be reduced to the point that they will be put in financial jeopardy when faced with the problem of abating a life threatening hazard. Such a result does not comport with the purposes of the Act

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[14] *See also, Samson Paper Bag Company, Inc.*, 8 OSHC 1515 (1980), wherein Commissioner Clearly indicates that economics may be a valid consideration.

> because in our view resources should be allocated on a priority basis to obtain the benefits that may be achieved by eliminating life threatening hazards first and lesser hazards second. And by saying "second" we do not mean second in time but rather second in priority for allocation of resources. In this regard Congress recognized the need for establishing priorities in eliminating workplace hazards. Thus it mandated Labor to set priorities on an urgency of the need basis. 29 U.S.C. 655(g).

4 OSHC at 1547.

Two Courts of Appeals have followed the Commission's lead in this regard. In *Turner Co.* v. *Secretary*, 561 F.2d 82 (7th Cir. 1977), the Seventh Circuit expressly adopted the test set out by the Commission in *Continental Can*, *supra*, stating:

> In this perspective the Commission must realistically consider the hazards presented by the excessive noise . . . and determine whether the health benefits to employees who are already equipped with personal protective equipment justify the . . . cost to Turner.

Turner Co. v. *Secretary*, *supra*, at 86.

Similarly, in *RMI Company* v. *Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979), the Sixth Circuit agreed with both the Commission's decision in *Continental Can*, *supra*, and the Seventh Circuit's decision in *Turner Co.*, *supra*. The court stated that economic feasibility "should be considered in promulgating and enforcing regulations" (594 F.2d at 572), and that [w]e insist that the Secretary and the OSHRC on review, weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible." 594 F.2d at 573.

While these three cases are enforcement cases, the principle espoused — that OSHA in considering alternative methods of compliance, must weigh the costs against the benefits — is equally applicable to the promulgation of new standards.[15]

In *I.U.D., AFL-CIO* v. *A.P.I., supra,* this Court in a plurality opinion held that OSHA must establish by substantial evidence that its standards eliminate a significant risk. While this holding forces OSHA to assess the benefits of its standards, it does not compel them to consider alternative, possibly less expensive, means of compliance that might be just as effective in eliminating significant risks. It is for this reason that it is important that this Court now require OSHA to demonstrate a reasonable relationship between the costs of its standards and the benefits to be derived from them.

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[15] The U.S. Court of Appeals for the Fifth Circuit has, of course, held that cost-benefit must be considered in the promulgation of a standard. *A.P.I.* v. *OSHA*, *supra*. That decision was affirmed by this Court on alternative grounds. *I.U.D., AFL-CIO* v. *A.P.I.*, *supra*.

CONCLUSION

For the foregoing reasons, we respectfully urge that the decision of the United States Court of Appeals for the District of Columbia Circuit be reversed.

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